## Before the **Federal Communications Commission**

Washington, DC 20554

In the Matter of:	)	
Closed Captioning of Internet	)	
Protocol-Delivered Video	)	
Programming: Implementation	)	MB Docket No. 11-154
of the Twenty-First Century	)	
Communications and Video	)	
Accessibility Act of 2010	)	

## Petition for Reconsideration of the Commission's Report and Order

Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI)

National Association of the Deaf (NAD)

Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN)

Association of Late-Deafened Adults (ALDA)

Hearing Loss Association of America (HLAA)

Cerebral Palsy and Deaf Organization (CPADO)

Technology Access Program at Gallaudet University (TAP)

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#### **SUMMARY**

Pursuant to 47 C.F.R. § 1.429, Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), the National Association of the Deaf (NAD), the Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN), the Association of Late-Deafened Adults (ALDA), the Hearing Loss Association of America (HLAA), and the Cerebral Palsy and Deaf Organization (CPADO), collectively, "Consumer Groups," and the Technology Access Program at Gallaudet University (TAP) respectfully request reconsideration of the Commission's *Report and Order* in the above-referenced proceeding.<sup>1</sup>

Consumer Groups seek to promote equal access to telecommunications, including video programming, for the 48 million Americans who are deaf, hard of hearing, late-deafened, or deaf-blind so that they may fully experience the informational, educational, cultural, and societal opportunities afforded by the telecommunications revolution. We applaud the Commission's important work in adopting rules that implement the closed captioning provisions of the Twenty-First Century Communications and Video Accessibility Act ("CVAA"). These rules represent an important step toward reaching the shared goal of Congress, Consumer Groups, and viewers who are deaf and hard of hearing: to ensure equal access to video programming for all Americans.

We respectfully request, however, that the Commission reconsider two particular aspects of the new rules that may impede the ultimate realization of this goal. First, we urge the Commission to require "video clips" to be captioned.

<sup>&</sup>lt;sup>1</sup> Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, Report and Order, 27 FCC Rcd. 787 (Jan. 13, 2012), 77 Fed. Reg. 19,480 (Mar. 30, 2012) ("Report and Order").

<sup>&</sup>lt;sup>2</sup> Pub. L. 111-260, 124 Stat. 2751 (Oct. 8, 2010) ("CVAA").

Second, we urge the Commission to extend timing obligations to device manufacturers under section 203 of the CVAA.

The Commission's decision to limit the captioning requirements for Internet protocol ("IP")-delivered programming to "full-length programming" and not "video clips" violates the CVAA's clear and unambiguous mandates.<sup>3</sup> The CVAA requires the Commission to include within the scope of the IP captioning rules "video clips" that otherwise satisfy the statute's provisions. Incidental references in the CVAA's legislative history to the terms "full-length programming" and "video clips" are best read, if at all, as colloquial references to programming that is otherwise exempt from the CVAA's provisions. And recent trends strongly indicate that industry members will utilize the Commission's "video clips" exemption to avoid the IP captioning rules altogether unless the Commission acts quickly to ensure equal access to viewers who are deaf or hard of hearing.

The Commission's decision not to impose timing requirements on the manufacturers of video programming apparatuses contravenes Congressional intent and the consensus recommendations of the Video Programming Accessibility Advisory Committee ("VPAAC").4 In particular, efforts aimed at ensuring that video programming is encoded and delivered with proper timing may be for naught if apparatuses are not required to synchronize the display of captions with video programming according to its timing data.

 $<sup>^3</sup>$  See Report and Order, 27 FCC Rcd. at 816,  $\P$  44.  $^4$  See id. at 853,  $\P$  112 & n.453.

#### **ARGUMENT**

## I. The Commission should require IP-delivered "video clips" to be captioned.

In the Notice of Proposed Rulemaking ("NPRM") in this proceeding, the Commission proposed to apply the CVAA's captioning requirements only "to full-length programming, and not to video clips." While the Commission, Consumer Groups, and other commenters undertook substantial discussion of the proper scope of the terms "full-length programming" and "video clips" throughout this proceeding, 6 scant attention was paid to the merits of the Commission's threshold proposal to limit the captioning rules to "full-length programming" and not "video clips."

Careful examination of the text, history, and purpose of the CVAA confirms that the Commission cannot exclude programming from the IP captioning rules solely on the basis of length or completeness. Specifically, the CVAA does not authorize the Commission to limit the scope of captioned video programming to "full-length programming" and not "video clips," a distinction that is neither referenced by the CVAA nor implied by its plain and unambiguous language. Nevertheless, should the Commission choose to acknowledge references to the terms "full-length programming" and "video clips" in the CVAA's legislative history, it should recognize that the references were merely intended to clarify that the CVAA does not apply to certain types of video programming already exempt from the Commission's captioning rules. Finally, the Commission must

<sup>&</sup>lt;sup>5</sup> Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility

Act of 2010, Notice of Proposed Rulemaking, 26 FCC Rcd. 13,734, 13,745-46,  $\P$  21 (2011) ("NPRM").

 $<sup>^{\</sup>hat{6}}$  E.g., Report and Order, 27 FCC Rcd. at 816-18,  $\P\P$  45-48.

quickly reverse the "video clips" exemption to prevent the serious likelihood that industry members will refuse to voluntarily caption excerpted video programming delivered via IP if not required to do so by the Commission.

## A. The CVAA does not authorize the Commission to exclude "video clips" from the IP captioning rules.

Agencies may form policy and make rules to fill gaps left by Congress.<sup>7</sup> But where the words of a statute are clear, an agency must resist reading words or elements into a statute and "give effect to the unambiguously expressed intent of Congress."

Neither the *NPRM* nor the *Report and Order* in this proceeding attempts to explain why the plain text of the CVAA is sufficiently ambiguous to permit the Commission to incorporate a length- or completeness-based distinction into the IP captioning rules. In the *NPRM*, the Commission offered no statutory support for its proposal to limit the IP closed captioning rules to "full-length programming" and not "video clips" other than a cursory citation to sections 202(a) and (b) of the CVAA.<sup>9</sup>

Neither section 202(a) or (b) nor any other parts of the CVAA, however, authorizes the Commission to limit the scope of the IP captioning rules to "full-

<sup>&</sup>lt;sup>7</sup> E.g., Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 843 (1985) (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

<sup>&</sup>lt;sup>8</sup> See Dean v. United States, 556 U.S. 568, 572 (2009) (quoting Bates v. United States, 522 U.S. 23, 29 (1997)) ("[W]e ordinarily resist reading words or elements into a statute that do not appear on its face."); Chevron, 467 U.S. at 842-43; Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992) (quoting Rubin v. United States, 449 U.S. 424, 430 (1981)) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'").

<sup>&</sup>lt;sup>9</sup> NPRM, 27 FCC Rcd. at 13,745-46, ¶ 21 & n.82 (citing 47 U.S.C. § 613(h)(2)).

length programming" and not "video clips" or otherwise authorize the Commission to exclude programming from the rules solely on the basis of length or completeness. Instead, the text of the CVAA unambiguously requires "video clips" to be captioned where they otherwise satisfy the CVAA's provisions, such as being published or exhibited on television with captions after the effective date of the Commission's rules. 10

In the *NPRM*, the Commission also relied on language from the Senate and House Committee Reports on the CVAA referencing the terms "full-length programming" and "video clips." <sup>11</sup> But because the CVAA's requirements are unambiguous about the necessary scope and permissible limitations of the IP captioning rules, the Commission cannot rely on the CVAA's legislative history as authority to import additional limitations on the scope of the IP captioning rules. Accordingly, the Commission cannot exclude "video clips" from the rules.

1. The text of the CVAA unambiguously requires "video clips" to be captioned where they otherwise satisfy the CVAA's provisions.

Section 202(b) clearly and unambiguously requires the Commission to regulate the captioning of IP-delivered programming and enumerates numerous specific limitations on the scope of programming subject to the Commission's regulations. But neither section 202(b) nor any other provision of the CVAA provides any basis, explicit or implicit, for the Commission to distinguish "full-length programming" from "video clips."

<sup>&</sup>lt;sup>10</sup> See 47 U.S.C. § 613(c)(2)(A).

 $<sup>^{11}</sup>$  NPRM, 26 FCC Rcd. at 13475-46, ¶ 21 & n.82 (citing S. Rep. No. 111-386, at 13-14 (2010); H.R. Rep. No. 111-563, at 30 (2010)).

More specifically, section 202(b) explicitly requires the Commission to "revise its regulations to require the provision of closed captioning on video programming delivered using Internet protocol that was published or exhibited on television with captions after the effective date of such regulations." Had Congress sought to limit the Commission's rules to "full-length programming" and not "video clips," it could have explicitly done so. But neither section 202(b) nor any other portion of the CVAA includes the terms "full-length programming" or "video clips."

Instead, section 202(b) requires the Commission to distinguish its captioning requirements for video programming on two bases: (1) the programming's delivery mechanism—"using Internet protocol"— and (2) the satisfaction of three particular conditions—(a) the publication or exhibition of the programming on television, (b) with captions, (c) after the effective date of the Commission's IP closed captioning rules.<sup>13</sup>

But section 202(b) provides no basis for the Commission to distinguish "video programming" on its length or completeness. Video programming is no less "delivered using Internet protocol" if only an excerpt is delivered via IP rather than a complete program. Nor can an excerpt of a program be any less "published or exhibited on television with captions after the effective date of [the Commission's] regulations" than the published or exhibited full-length program from which the excerpt is taken.

The Commission also cannot distinguish "full-length programming" from "video clips" on the basis that the former constitutes "video programming" while the latter does not. Section 202(a) of the CVAA defines the term "video"

<sup>&</sup>lt;sup>12</sup> 47 U.S.C. § 613(c)(2)(A).

<sup>&</sup>lt;sup>13</sup> *Id*.

programming" as "programming by, or generally considered comparable to programming provided by a television broadcast station, but not including consumer-generated media." Section 202(a)'s definition requires the Commission to distinguish its captioning requirements for non-consumer-generated programming based on the programming's creator—"by . . . a television station"—or its qualitative nature—"generally considered comparable to programming provided by a television station." 15

But again, section 202(a) provides no basis for the Commission to distinguish non-consumer-generated programming on the basis of length or completeness. An excerpt from a broadcast television news program, for example, is no less "by . . . a television broadcast station" than the full program from which it is excerpted. <sup>16</sup>

Furthermore, the Commission cannot distinguish "full-length programming" from "video clips" on the basis that the "video clips" constitute "consumer-generated media." Section 101 of the CVAA defines the term "consumer-generated media" as "content created and made available by consumers to online websites and services on the Internet, including video, audio, and multimedia content." Thus, the Commission must distinguish its captioning requirements for non-consumer-generated programming based on whether the creator of the program is a consumer, whether the consumer has

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<sup>&</sup>lt;sup>14</sup> 47 U.S.C. § 613(h)(2).

<sup>&</sup>lt;sup>15</sup> *Id* 

<sup>&</sup>lt;sup>16</sup> Nor would the distinction under section 202(a) be particularly relevant in any event; as the Commission acknowledges, "anything that was published or exhibited on television" pursuant to section 202(b) must necessarily "be provided by, or be comparable to programming provided by, a television broadcast station." *See Report and Order*, 27 FCC Rcd. at 814-15, ¶ 41 & n. 185.

<sup>17</sup> 47 U.S.C. § 153(14).

distributed the program to online websites or services on the Internet, and whether the program includes video, audio, or multimedia content.

Yet section 101(a) provides no basis for the Commission to distinguish "consumer-generated media" on its length or completeness. Content is no less created by a consumer, distributed to online websites or services on the Internet, nor qualitatively "video, audio, or multimedia" in nature if it is delivered only in part rather than as a whole.

Section 202(b) instructs the Commission to distinguish programming based on its length or completeness in one specific case: by considering whether or not programming is "edited for Internet distribution" in determining "an appropriate schedule of deadlines to require the provision of closed captioning." Indeed, a "full-length program" might not be "edited for Internet distribution," while an excerpted "video clip" of the program could be considered "edited for Internet distribution."

But section 202(b) does not provide the Commission with any authority to exclude "edited" programming from the scope of the IP captioning rules altogether solely on the basis of length or completeness. <sup>19</sup> Rather, it merely authorizes the Commission to consider programming's length or completeness in promulgating compliance deadlines<sup>20</sup>—as the Commission did in requiring that unedited prerecorded programming be captioned within six months of the publication of the IP captioning rules in the Federal Register and edited prerecorded programming within eighteen months. <sup>21</sup>

<sup>&</sup>lt;sup>18</sup> See 47 U.S.C. § 613(c)(2)(B), (D)(i).

<sup>&</sup>lt;sup>19</sup> See id.

<sup>&</sup>lt;sup>20</sup> Id.

 $<sup>^{21}</sup>$  Report and Order, 27 FCC Rcd. at 819, ¶ 51.

Finally, section 202(b) permits the Commission to exempt classes of programming from the IP captioning rules upon a determination that providing captions would pose an undue economic burden.<sup>22</sup> Of course, it might be possible for the Commission to distinguish a particular "class of programming," such as "video clips," on the basis of length or completeness. But to exempt such a class from the captioning rules, the Commission would have to determine that captioning literally any "video clip" for IP delivery would pose an undue economic burden.

The record in this proceeding does not conceivably support such a conclusion. In fact, the Commission expressly declined to adopt any categorical exemptions from the IP captioning rules, noting that no commenter had demonstrated "that compliance with the IP closed captioning requirements would be an economic burden." Moreover, the Commission implicitly disclaimed the possibility that the act of providing captions for a "video clip" excerpted from a "full-length program" for IP delivery could in and of itself constitute an undue economic burden, citing widespread consumer and industry agreement that a "full-length program posted online in multiple [excerpted] segments . . . will have to be captioned."<sup>24</sup>

In short, the CVAA provides no basis, whether explicit or implicit, for the Commission to exclude programming from the scope of the IP captioning rules solely on the basis of length or completeness. Accordingly, the Commission's decision to limit the rules to "full-length programming" and not "video clips" finds no support in the text of section 202(b) or the rest of the CVAA.

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<sup>&</sup>lt;sup>22</sup> 47 U.S.C. § 613(d)(1).

<sup>&</sup>lt;sup>23</sup> Report and Order, 27 FCC Rcd. at 829-30,  $\P$  70.

<sup>&</sup>lt;sup>24</sup> See id. at 816-17 ¶ 45 & n.197.

## 2. The Commission cannot rely on the CVAA's legislative history to contravene unambiguous requirements in the CVAA's text.

As the Commission noted in the *NPRM*, the House and Senate Committee Reports on the CVAA refer to the terms "full-length programming" and "video clips." Both Reports noted that the Committees intended the CVAA's captioning requirements "to apply to full-length programming and not to video clips." These references, however, are only relevant to the Commission's promulgation of IP closed captioning rules to the extent that the text of the CVAA's mandates is ambiguous.

While "legislative history may give meaning to ambiguous statutory provisions," administrative agencies cannot implement "alleged principles gleaned solely from legislative history that has no statutory reference point." As discussed above, the CVAA is unambiguous in its mandate that the Commission require closed captioning of IP-delivered "video clips" that otherwise satisfy the CVAA's provisions. Because Congress chose not to limit the scope of the IP captioning rules to "full-length programming" or to exclude "video clips" in the text of the CVAA, and because there exists no ambiguity in the CVAA conceivably suggesting that Congress intended such a limitation, no statutory reference point exists that would permit the Commission to rely on the CVAA's legislative history. Accordingly, the references to the terms "full-length programming" and "video clips" in the Committee Reports do not carry the

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<sup>&</sup>lt;sup>25</sup> NPRM, 26 FCC Rcd. at 13,745, ¶ 21 & n.82.

<sup>&</sup>lt;sup>26</sup> S. Rep. No. 111-386 at 13-14; H.R. Rep. No. 111-563 at 30.

<sup>&</sup>lt;sup>27</sup> See, e.g., Int'l Bhd. of Elec. Workers v. NLRB, 814 F.2d 697, 699-700 (D.C. Cir. 1987) (emphasis in original); United States v. Am. Coll. of Physicians, 475 U.S. 834, 845-46 (1986); SEC v. Sloan, 436 U.S. 103, 121 (1978).

force of law and cannot authorize the Commission to limit the scope of the captioning rules.

Because the CVAA's mandates are clear and unambiguous with respect to the scope of video programming subject to the IP captioning rules, the Commission's decision to limit its IP captioning rules to "full-length programming" and "video clips" is without statutory basis and stands in stark contrast to Congress's plain and obvious intent in enacting the CVAA. Accordingly, we urge the Commission to reconsider its decision and require captioning of "video clips" that otherwise satisfy the provisions of the CVAA.

B. References to "video clips" in the CVAA's legislative history were intended to refer to videos already exempt from the captioning rules, not to create a new class of uncaptioned programming.

Should the Commission choose to acknowledge the Committee Reports' suggestion that the CVAA's captioning requirements should "apply to full-length programming and not to video clips," it should recognize that the Committees did not intend for the Commission to limit the scope of its rules by creating new classes of captioned programming—"full-length programming"—and uncaptioned programming—"video clips." This interpretation, adopted by the Commission in the *Report and Order*, impermissibly construes two general terms by arbitrarily considering them without meaningful reference to their commonly understood meanings or the overall captioning scheme of the CVAA.

Rather, the Committees' likely intent in noting that "video clips" need not be captioned was to clarify that certain categories of video programs are exempt from the IP captioning rules either implicitly—because they need not be

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<sup>&</sup>lt;sup>28</sup> S. Rep. No. 111-386 at 13-14; H.R. Rep. No. 111-563 at 30.

<sup>&</sup>lt;sup>29</sup> Report and Order, 27 FCC Rcd. at 816-17, ¶¶ 44-45.

captioned when published or exhibited on television<sup>30</sup> and therefore are generally not subject to the CVAA when delivered via IP—or explicitly by an exemption in the CVAA itself.<sup>31</sup> Because the Committees' intended exemption of "video clips" is already accomplished by the inherent operation of other provisions of the CVAA, the Commission should remove the exemption of "video clips" from its rules.

As Representative Edward Markey and Senator Mark Pryor noted in a January 10, 2012 letter to the Commission, the Committees' reference to the terms "full-length programming" and "video clips" is sensibly explained, at least in part, by reference to the numerous exemptions in the Commission's television closed captioning rules for programming of short duration. The television rules exempt, for example, "advertisements of five minutes' duration or less" and "[i]nterstitial material, promotional announcements, and public service announcements that are 10 minutes or less in duration."

In light of the television captioning rules, the Committees' intent that "video clips" not be covered by the IP captioning rules can plausibly be understood as a reference to the Commission's television rules. More particularly, "video clips" refers to short advertisements, interstitial material, promotional announcements, and public service announcements that need not be captioned on television and therefore are generally not subject to the CVAA's

<sup>&</sup>lt;sup>30</sup> E.g., 47 C.F.R. § 79.1(a)(1), (d).

<sup>&</sup>lt;sup>31</sup> See 47 U.S.C. § 613(c)(2)(A).

<sup>&</sup>lt;sup>32</sup> Letter from Rep. Edward Markey and Sen. Mark Pryor to the Honorable Julius Genachowski, Chairman, FCC (Jan. 10, 2012),

http://apps.fcc.gov/ecfs/document/view?id=7021753144.

<sup>&</sup>lt;sup>33</sup> 47 C.F.R. § 79.1(a)(1).

<sup>&</sup>lt;sup>34</sup> 47 C.F.R. § 79.1(d)(6).

requirements when delivered via IP—because they are generally not published or exhibited on television with captions.

The Committees' intent that "video clips" not be covered by the IP captioning rules is also sensibly explained by reference to exemptions in the CVAA itself. In particular, section 202(a) exempts "consumer-generated media" from the scope of video programming that must be captioned under section 202(b) when delivered using IP. "Consumer-generated media" is defined by section 101 of the CVAA as "content created and made available by consumers to online websites and services on the Internet, including video, audio, and multimedia content." Videos made available to online websites and services on the Internet are frequently referred to as "video clips." "

Because "consumer-generated media" need not be captioned under the CVAA, the Committees' intent that "video clips" not be covered by the IP captioning rules can also be understood as a reference to the "consumer-generated media" exemption. Moreover, "consumer-generated media," by definition, is made available to online websites and services on the Internet and not published or exhibited on television. Accordingly, consumer-generated media is generally not subject to the CVAA's basic requirements because it is not published or exhibited on television with captions.

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<sup>&</sup>lt;sup>35</sup> 47 U.S.C. § 613(c)(2)(A), (h)(2).

<sup>&</sup>lt;sup>36</sup> 47 U.S.C. § 153(14).

<sup>&</sup>lt;sup>37</sup> *E.g., Clip Culture,* The Economist, Apr. 17, 2006, *available at* http://www.economist.com/node/6863616.

<sup>&</sup>lt;sup>38</sup> See 47 U.S.C. § 153(14).

<sup>&</sup>lt;sup>39</sup> But see Report and Order, 27 FCC Rcd. at 815, ¶ 42 ("[W]hen consumergenerated content is shown on television as part of a captioned full-length program which a VPD then distributes over the Internet, the Internet version of the captioned full-length program must include captions. . . . For example, if a consumer creates a video and makes it available on YouTube, and that video is

In the *Report and Order*, the Commission acknowledged the letter from Rep. Markey and Sen. Pryor, but chose not to address Rep. Markey's and Sen. Pryor's explanation of the Committees' intent. <sup>40</sup> And the Commission provided no explanation of why the Committees' references to "video clips" were more sensibly explained by the wholesale creation of an entire class of uncaptioned programming unspecified by the text of the CVAA, rather than by reference to the long-standing categorical exemptions for certain types of programming in the Commission's television captioning rules. Nor did the Commission explain why the Committees' reference to "video clips" could not plausibly be explained in terms of the CVAA's exemption for consumer-generated media.

Because the overall purpose of the CVAA and the Commission's current captioning rules offer a more reasonable interpretation of the Senate and House Committees' respective intents, the Commission should remove the exemption of "video clips" from its rules.

# C. Exempting "video clips" will deny consumers who are deaf or hard of hearing access to critical areas of programming.

Regardless of the basis for the Commission's decision to exclude "video clips" from the IP captioning rules, we applaud the Commission's acknowledgement that the Committees intended any such exclusion to be temporary. In particular, the Commission acknowledged that it may need to "determine, at a later time, that congressional intent . . . may warrant applying [the IP] captioning requirements beyond full-length programming, by for

then shown with captions as part of a news broadcast on television, then that full-length news broadcast (which includes the consumer-generated video) must include captions when a VPD distributes it via IP.").

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<sup>&</sup>lt;sup>40</sup> *Id.* at 818, ¶ 48 & n.203.

<sup>&</sup>lt;sup>41</sup> *Id.* at 817-18, ¶ 48.

example including video clips within the captioning requirements or defining the term more narrowly."<sup>42</sup> It further noted that, "if [it] finds that consumers who are deaf or hard of hearing are not getting access to critical areas of programming, such as news, because of the way the programming is posted (e.g., through selected segments rather than full-length programs), [it] may reconsider this issue to ensure that [its] rules meet Congress's intent to bring captioning access to individuals viewing IP-delivered programming."<sup>43</sup> We urge the Commission to reconsider the issue now.

As Consumer Groups repeatedly expressed in *ex parte* meetings, it is critical for the Commission's rules to ensure that the vast majority of IP-delivered programming is accessible to viewers who are deaf or hard of hearing. <sup>44</sup> As Rep. Markey and Sen. Pryor noted in their letter to the Commission, "Americans increasingly are accessing online news, information and entertainment" through "video clips." <sup>45</sup> Since 2008, more than two and a half million television consumers canceled their cable or satellite television subscriptions in favor of IP-delivered video services — including more than one million consumers in 2011. <sup>46</sup> And thirty-three percent of consumers streamed a movie or television show from the Internet through a subscription service such as Hulu or Netflix. <sup>47</sup> The time

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<sup>&</sup>lt;sup>42</sup> *Id*.

<sup>&</sup>lt;sup>43</sup> *Id*.

<sup>&</sup>lt;sup>44</sup> *E.g.*, Letter from Blake Reid, Counsel for TDI, to Marlene H. Dortch, Secretary, FCC, MB Dkt. No. 11-154, at 2-3 (Dec. 15, 2011) ("Consumer Groups Dec. 15 *Ex Parte*"), http://apps.fcc.gov/ecfs/document/view?id=7021750876.

<sup>&</sup>lt;sup>45</sup> Letter from Rep. Markey and Sen. Pryor.

<sup>&</sup>lt;sup>46</sup> Anthony Palazzon, *Estimated 1 Million Pay-TV Users Cut Cord for Web in 2011*, Bloomberg (Apr. 3, 2012), <a href="http://www.bloomberg.com/news/2012-04-04/estimated-1-million-pay-tv-users-cut-cord-for-web-in-2011.html">http://www.bloomberg.com/news/2012-04-04/estimated-1-million-pay-tv-users-cut-cord-for-web-in-2011.html</a>.

<sup>&</sup>lt;sup>47</sup> Nielsen, *State of the Media: U.S. Digital Consumer Report, Q3-Q4 2011*, at 13, <a href="http://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2012-Reports/Digital-Consumer-Report-Q4-2012.pdf">http://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2012-Reports/Digital-Consumer-Report-Q4-2012.pdf</a>.

consumers spent watching online video increased by seven percent in the past year. <sup>48</sup> And a significant proportion of this increase in online video is due to the widespread dissemination of "video clips" designed to be viewed on mobile devices and shared via social networks. <sup>49</sup>

Unfortunately, viewers who are deaf or hard of hearing have become second-class citizens in the online video renaissance because online videos—and "video clips" in particular—are infrequently captioned. <sup>50</sup> While the CVAA's captioning mandates promise to reverse this inequality, the Commission's decision to exclude "video clips" excerpted from full-length programming from the rules will leave one of the largest and most important segments of the IP-delivered video marketplace inaccessible.

This problem may be the most serious with respect to news programming. As the Commission acknowledges, "[i]t is particularly important that news content, which plays the vital role of ensuring an informed citizenry, be made accessible to all citizens." Yet online providers of news programming are among the most likely to distribute programming in excerpted "video clip" form—and among the least likely to caption it. For example, Cable News Network's popular online video portal, CNN.com, routinely contains approximately 150 uncaptioned video segments covering a spectrum of important political issues and other news. 52 Likewise, the online counterpart of

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<sup>&</sup>lt;sup>48</sup> *Id.* at 5.

 $<sup>^{49}</sup>$  As the *Report and Order* recognizes, posting full-length programs online in multiple segments is becoming a popular tool for VPDs "to enable consumers to more readily access a particular segment of the program." *Report and Order*, 27 FCC Rcd. at 816-17, ¶ 45.

<sup>&</sup>lt;sup>50</sup> See S. Rep. No. 111-386 at 1-2; H.R. Rep. No. 111-563 at 19.

<sup>&</sup>lt;sup>51</sup> Report and Order, 27 FCC Rcd. at 817-18,  $\P$  48.

<sup>&</sup>lt;sup>52</sup> See CNN, http://cnn.com/video (last accessed Apr. 26, 2012); Consumer

the Fox News network distributes programming in the form of more than 400 uncaptioned "video clips." <sup>53</sup>

CNN and Fox are not the only outlets that do not make their programming accessible; our research indicates that a vast majority of mainstream news outlets, including ABC,<sup>54</sup> NBC,<sup>55</sup> CNBC,<sup>56</sup> CBS,<sup>57</sup> and PBS<sup>58</sup> distribute programming online in the form of uncaptioned video clips. As of April 26, 2012, we were able to identify only two mainstream online news outlets—C-SPAN and MSNBC—that voluntarily distribute some of their news programming in "video clips" with captions or subtitles.<sup>59</sup>

Groups Dec. 15 *Ex parte* at 2-3.

<sup>&</sup>lt;sup>53</sup> See Fox News, http://video.foxnews.com/ (last accessed Apr. 26, 2012).

<sup>&</sup>lt;sup>54</sup> ABC News, <a href="http://abcnews.go.com/Video/playerIndex?catId=4765066">http://abcnews.go.com/Video/playerIndex?catId=4765066</a> (last accessed Apr. 26, 2012).

<sup>&</sup>lt;sup>55</sup> NBC appears to stream over 800 uncaptioned "video clips" of the Today Show, Nightly News with Brian Williams, and Editors Picks of NBC News through Hulu. No full-length versions appear to be offered. *See, e.g.*, Hulu, <a href="http://www.hulu.com">http://www.hulu.com</a> (last accessed Apr. 26, 2012).

<sup>&</sup>lt;sup>56</sup> CNBC.com appears to stream more than 2500 uncaptioned "video clips." No full-length programming appears to be offered, and it is unclear whether these segments, when combined, are part of full-length programs. http://www.cnbc.com/id/15839263 (last accessed Apr. 26, 2012).

<sup>&</sup>lt;sup>57</sup> CBS News streams a large library of uncaptioned "video clips"; no full-length versions are available. <a href="http://www.cbsnews.com/video?tag=embedFD">http://www.cbsnews.com/video?tag=embedFD</a> (last accessed Apr. 26, 2012).

<sup>&</sup>lt;sup>58</sup> PBS NewsHour streams more than seventy-five "full episodes" and 2233 "video clips" without captions. <a href="http://video.pbs.org/program/newshour/">http://video.pbs.org/program/newshour/</a> (last accessed Apr. 26, 2012).

<sup>&</sup>lt;sup>59</sup> C-SPAN, <a href="http://www.c-spanvideo.org/videoLibrary/">http://www.c-spanvideo.org/videoLibrary/</a> (last accessed Apr. 26, 2012); MSNBC, <a href="http://www.msnbc.msn.com/id/8004316/ns/video/">http://www.msnbc.msn.com/id/8004316/ns/video/</a> (last accessed Apr. 26, 2012). Moreover, it will be difficult, if not impossible, for consumers or to determine whether several related "video clips" distributed online constitute a "full-length" program and are therefore subject to captioning requirements. See Report and Order, 27 FCC Rcd. at 816-17, ¶ 45.

Moreover, it appears that many news outlets will resist making their "video clips" accessible if not obliged to do so under the Commission's rules. On June 15, 2011, the Greater Los Angeles Alliance on Deafness (GLAD) filed a complaint against Cable News Network (CNN) under California's disability laws for refusing to caption online content on CNN.com. <sup>60</sup> In response to GLAD's claims, CNN argued that it could not be compelled to caption its programming except by the Commission's actions in this rulemaking. <sup>61</sup> Moreover, CNN insinuated that it would not undertake voluntary captioning of its programming, noting that using "current sub-par closed captioning technology" would result in inaccuracies that would not satisfy CNN's editorial standards." <sup>62</sup> CNN further insists that requiring it to caption its programming would violate the First Amendment. <sup>63</sup>

We are also concerned that providers of entertainment and informational programming will be equally resistant to captioning video clips. For example, Hulu offers excerpted "TV clips" of an extensive selection of video programming from a wide range of video programmers—nearly 110,000 "clips" at the time of this filing. <sup>64</sup> Yet captions are unavailable for a vast majority of the "clips"—nearly 98%. <sup>65</sup>

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<sup>&</sup>lt;sup>60</sup> Compl., *GLAD v. Time Warner, Inc.*, No. 4:11-cv-03458-LB (N.D. Cal. June 14, 2011) (Attachment A).

<sup>&</sup>lt;sup>61</sup> Answer at 10-15, ¶ 2, *GLAD v. Time Warner*, *Inc.*, No. 4:11-cv-03458-LB (N.D. Cal. Aug. 19, 2011) (Attachment B); Mot. to Strike at 1-2, 8, 10, 12, 14, *GLAD v. Time Warner*, *Inc.*, No. 4:11-cv-03458-LB (N.D. Cal. Sept. 12, 2011) (Attachment C) <sup>62</sup> See Supplemental Br. in Supp. of Special Mot. to Strike at 12-13, *GLAD*, *et al. v. Time Warner*, No. 4:11-cv-03458-LB (N.D. Cal. Jan. 9, 2012) (Attachment D). <sup>63</sup> *Id.* at 10-14.

<sup>&</sup>lt;sup>64</sup> Hulu, <a href="http://www.hulu.com/popular/clips?src=topnav">http://www.hulu.com/popular/clips?src=topnav</a> (last accessed Apr. 26, 2012).

<sup>&</sup>lt;sup>65</sup> Hulu offers approximately 110,000 video clips for viewing. Only approximately 2500 of these clips are captioned. *See* Hulu,

We are deeply concerned that these examples of resistance to captioning online programming will be representative of a large-scale refusal by online video programmers to voluntarily caption "video clips" — or an unacceptable delay in doing so. Notwithstanding the Commission's commendable decision to "encourage the industry to make captions available on all TV news programming that is made available online, even if it is made available through the use of video clips," the industry is unlikely to caption "video clips" unless and until the Commission requires it.

We urge the Commission to act swiftly and avoid the harm that is certain to occur if the "video clips" loophole remains open. Waiting for some unspecified future date to address the unequal treatment of "video clip" viewers who are deaf or hard of hearing is unlikely to result in a serendipitous change of heart by the industry; rather, such a delay will simply maintain the status quo and compound the denial of equal access those viewers are already experiencing. Accordingly, the Commission should now determine that Congress's intent "to help ensure that people with disabilities are able to better access video programming" warrants applying its regulations beyond-full length programming by including video clips within its requirements. 66

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http://www.hulu.com/popular/clips?h=17&has\_captions=1&timeframe=all\_time&has\_free=0 (last accessed Apr. 26, 2012).

<sup>&</sup>lt;sup>66</sup> See Letter from Rep. Markey and Sen. Pryor; Report and Order, 27 FCC Rcd. at 817-18, ¶ 48.

## II. The Commission should impose synchronization requirements on device manufacturers to ensure that apparatuses display captions in time with video programming.

We applaud the Commission's decision to require video programming distributors ("VPDs") to ensure that timing data is encoded and maintained throughout the captioning interchange and delivery system.<sup>67</sup> As the VPAAC Report acknowledged, the "timing of the presentation of caption text with respect to [a] video" is critical to a viewer's captioning experience and his or her understanding of the programming.<sup>68</sup>

We urge the Commission, however, to reconsider its decision to excuse device manufacturers from any timing obligations.<sup>69</sup> The Commission should require device manufacturers that render captioning data to do so precisely according to the timing data included with the video. Absent a timing obligation on device manufacturers, efforts to encode captions with proper timing and synchronization at the programming source and efforts by VPDs to maintain that timing and synchronization throughout the caption interchange and delivery system may be for naught.

As several of the Consumer Groups explained during a February 24 ex parte presentation, timing and synchronization problems can occur at the apparatus level as well as at the captioning and distribution level. 70 When audio

<sup>&</sup>lt;sup>67</sup> *Report and Order*, 27 FCC Rcd. at 852-53, ¶ 112.

<sup>&</sup>lt;sup>68</sup> First Report of the Video Programming Accessibility Advisory Committee on the Twenty-First Century Communications and Video Accessibility Act of 2010: Closed Captioning of Video Programming Delivered Using Internet Protocol, at 13, July 12, 2011 ("VPAAC Report"), http://transition.fcc.gov/cgb/dro/ VPAAC/First\_VPAAC\_Report\_to\_the\_FCC\_7-11-11\_FINAL.pdf.

<sup>&</sup>lt;sup>69</sup> *Report and Order*, 27 FCC Rcd. at 852-53, ¶ 112 & n.453

<sup>&</sup>lt;sup>70</sup> Letter from Blake Reid, Counsel for TDI, to Marlene H. Dortch, Secretary, FCC,

and video streams arrive at an end user's apparatus, captioning data must be properly encoded and maintained to ensure a timing experience equal to or greater than when shown on television.<sup>71</sup>

Many digital televisions, set-top boxes, and other video playback devices, however, perform video post-processing that may delay the display of video programming. For example, an apparatus may improve the resolution of a program's visual component for when connecting to other devices; adjust the picture to a more vibrant or cinematic color scheme; or sharpen the resolution for a crisper visual experience.

Although post-processing can improve a consumer's viewing experience, it may result in timing errors if the rendering of captions is not adjusted to compensate for the delay introduced by post-processing. And the display of captions themselves may be delayed if a device is not properly designed to render them according to the timing data it receives. If device manufacturers are not required to render captions according the timing data included with video, captions may be displayed out of sync with video, even if they are properly synchronized at the time of encoding and the synchronization is maintained throughout the caption interchange and delivery system.

At this time, the Commission's rules impose no timing requirements at the apparatus level. VPDs are responsible for ensuring that timing data is preserved throughout the captioning interchange and delivery system. 72 VPDs, however, are not responsible for rendering the captions with proper timing once the video

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MB Dkt. No. 11-154, at 3 (Feb. 24, 2012), http://apps.fcc.gov/ecfs/document/view?id=7021865156.

 $<sup>^{71}</sup>$  See Report and Order, 27 FCC Rcd. at 853,  $\P$  112 & n.453.

<sup>&</sup>lt;sup>72</sup> Id.

and captions are received by an apparatus.<sup>73</sup> Although VPDs that provide applications, plug-ins, or devices to consumers in order to deliver their programming must ensure that those applications, plug-ins, and devices comply with the apparatus requirements of section 203 of the CVAA,<sup>74</sup> the rules impose no timing obligation on those apparatuses.<sup>75</sup>

In short, the current formulation of the Commission's rules requires a VPD to maintain the timing of captions throughout the captioning delivery and interchange system, but does not require that the captions actually be rendered according to that timing on the apparatus that the end user must use. Thus, a viewer may see unsynchronized or poorly timed captions even where captions are properly encoded and delivered to the viewer's apparatus intact. This absurd result cannot have been the intent of Congress or the VPAAC.

In choosing not to impose synchronization requirements on device manufacturers, the Commission, relying exclusively on language in the VPAAC Report describing timing obligations in the distribution chain, concluded that the "direction from the VPAAC Report places no responsibility on device manufacturers."

This conclusion is unsupported by the VPAAC Report, which expressed concern about the performance of devices as well as distributors. Specifically, the VPAAC Report recognizes that at a minimum, a consumer's device must be "appropriately equipped (e.g., with built-in hardware and software, specialized Web browser plug-ins, and/or downloaded software applications) to decode captions with at least the same quality and control as the CEA 608/708 system

 $<sup>^{73}</sup>$  Id

 $<sup>^{74}</sup>$  Report and Order, 27 FCC Rcd. at 806,  $\P$  27.

<sup>&</sup>lt;sup>75</sup> See id. at 852-53, ¶ 112.

<sup>&</sup>lt;sup>76</sup> *Id.* at 853, n.453.

enables for broadcast TV."<sup>77</sup> Given that the VPAAC identifies timing as a vital performance objective, the VPAAC Report should be read as directing the Commission to impose timing requirements on device manufacturers as well on video distributors to ensure that devices display captions in sync with video programming.

Unless timing requirements are imposed upon all entities involved in the creation, transmission, and rendering of captions, the Commission's current timing requirements will be ineffective. Thus, to give full effect to the VPAAC's recommendations, the Commission should extend timing obligations to device manufacturers.

### **CONCLUSION**

We urge the Commission to require "video clips" that otherwise satisfy the CVAA's provisions to be captioned and to extend timing obligations to device manufacturers. By doing so, the Commission will take important steps to fulfill the CVAA's promise for equal access to IP-delivered video programming for all Americans.

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<sup>&</sup>lt;sup>77</sup> VPAAC Report at 21.

Respectfully submitted,

/s/

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